U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

June 1, 1999

Karen D. Dacres, Esq.
Office of the Deputy Chief Counsel
National Institute of Standards and Technology
U.S. Department of Commerce
Administration Building, Room A813
Gaithersburg, Maryland 20899-001

Dear Ms. Dacres:

This responds to your request for a Department of Transportation (DOT) opinion as to whether the motor carrier deregulation provisions of the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), 49 U.S.C. § 14501(c)(1) and (c)(2), have preemptive effect on state regulation of weights and measures calibration for carriers. Those provisions generally preempt states from enacting or enforcing laws or regulations related to a price, route, or service of any motor carrier with respect to the transportation of property.

You report that a dispute has arisen between your Office of Weights and Measures and United Parcel Service (UPS) over the effect of this language on industry weights and measures enforcement activities by states. UPS, a motor carrier as well as air carrier, contends that the FAAA Act preempts states from enforcing uniform weights and measures laws in connection with scales UPS provides to shippers as part of their services. Your Office is involved because state weights and measures laws take effect in states through their adoption of standards sanctioned by the National Conference of Weights and Measures (NCWM), an organization sponsored by your office and composed of federal government, state government, and private sector members (including UPS). The position of your Office is that Congress did not intend to preempt the states from their present role of responsibility for enforcing such standards.

We further understand that the National Institute of Standards and Technology (NIST) has been authorized by Congress, as was its predecessor, the National Bureau of Standards, to undertake various functions including the "investigation and testing of ... scales used in weighing commodities for interstate shipment" and has been responsible for "cooperation with the States in securing uniformity in weights and measures laws and methods of inspection." Pub. L. 619, ch. 486, 64 Stat. 371 (1950); 15 USC § 272 (1950 to 1988).[1] NIST sponsors and acts as

[1] In 1988, 15 USC § 272 was modified and the "testing of scales" provision was replaced with "broad[er] language" but nevertheless "every function" previously assigned was retained.

secretariat for NCWM, which develops the standards for measuring devices and practices. NIST publishes the standards in Handbook 44.[2] The standards are in turn given legal effect by the states after they adopt the Handbook 44 model. All 50 states, the District of Columbia, and all U.S. territories have adopted the Handbook 44 model. Thus the state-enforced weights and measures laws are derived from federal legislation, and provide in effect a uniform federally-sanctioned scheme of regulation.

The NIST scales standards in Handbook 44 set out numerous measures for commercial scales "to achieve, to the maximum extent possible, standardization in weights and measures laws and regulations among the various states and local jurisdictions in order to facilitate trade between the states, permit fair competition among businesses, and provide uniform and sufficient protection to all consumers in commercial weights and measures practices." NIST Handbook 44, § 2.20; NIST Handbook 130, p. 1 (1996). A necessary corollary of the system of standards is a system for enforcement of the standards. The states have authority, under a NIST model law that most have adopted, to take enforcement action against anyone who violates the standards. NIST Handbook at 20-21 (1996). The state enforcement program typically involves an annual or semiannual inspection of the scales (a 15-20 minute test of the scale accuracy), and in some cases an inspection fee. Inevitably, a particular state's inspection and enforcement program may have some features different from another; for example, each state can set its own level of fines for violations.

As noted above, UPS objects to state enforcement of the Handbook 44 standards with regard to scales that UPS supplies to its shippers. UPS provides equipment to its shippers as part of the UPS Maxiship® and UPS On Line™ Professional service packages. The equipment provided by UPS to shippers using these services includes: 1) a report printer; 2) a keyboard; 3) a central processing unit; 4) a computer monitor; 5) a label printer; 6) a barcode scanner; and 7) an electronic scale. Maxiship® entails a software package, and UPS On Line™ Professional entails a Windows compatible internet service with electronic upgrades. With the Maxiship® and UPS On Line™ Professional packages, UPS customers can engage in advanced weighing, tracking, and billing technologies, such as self billing. UPS states further that the fact that the shippers themselves control the devices and weigh their packages undermines a concern that they might be deceived or otherwise injured by improperly calibrated scales.

Omnibus Trade and Competitiveness Act of 1988, § 5112, Pub. L. 100-418, 102 Stat. 1428; H.R. Conf. Rep. No. 100-576, 100th Cong. 2d Sess. 930 (1988).

[2] In 1988, NIST was specifically directed by Congress "[i]n addition to such other technology services ... which may be mandated or authorized by law ... [to] work directly with States ... to provide for extended distribution of Standard Reference Materials, Standard Reference Data, calibrations, and related technical services and to help transfer other expertise and technology to the States and to ... businesses within the States [and to] work with other Federal agencies to provide technical and related assistance to the States and businesses within the States." National Institute of Standards and Technology Authorization Act for Fiscal Year 1989; Pub. L. 100-519, § 109; 102 Stat. 2589 (1988).

UPS argues that the scales it provides to its shippers "relate to" its services within the meaning of the FAAA Act, and therefore, any state regulation of these scales is preempted.[3] UPS argues that the Supreme Court has adopted a broad interpretation of the words "relating to" in the analogous provisions of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713, in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) and *American Airlines v. Wolens*, 513 U.S. 219 (1995), and that the scales provided by UPS relate to UPS services. UPS also has asserted that Congress demonstrated its intent to preempt state enforcement of weights and measures standards by failing to make an explicit exception for this kind of enforcement activity. UPS further asserts that the majority of courts deciding whether other state laws were preempted have found those laws to be preempted, with the exception of contract claims.[4]

In *Morales*, the Supreme Court noted that in enacting the ADA, Congress had determined that "maximum reliance on competitive forces would best further efficiency, innovation and low prices," as well as "variety [and] quality of air transportation services." *Morales*, 504 U.S. at 378. The court also stated that the purpose of the preemption provision was to "ensure that the States would not undo federal deregulation with regulation of their own." *Id.* The court interpreted the words "relating to" broadly in accordance with the ordinary meaning of the words, and held that state regulation of airline advertisements was preempted. However, the court acknowledged that some state action may affect an air carrier's fares in "too tenuous, remote, or peripheral a manner" to have preemptive effect. *Id.* at 390. In *Wolens*, the court further refined the limit of the preemptive effect of the words "relating to," in finding that 49 U.S.C. § 41713 preempted frequent flyer claims against an airline under state consumer fraud law, but not claims for breach of contract. The Court there also agreed with the views of the United States, submitted as amicus curiae, that the words "relating to rates, routes and services" is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean that "States may not seek to impose their own public policies or theories of competition or regulation on the air carrier." *Id.* at 229, fn. 5 (citation omitted).

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[3] These arguments were presented to the Department in letters from counsel for UPS dated February 14, 1997, November 3, 1998, and November 19, 1998.

[4] In support for its arguments, UPS relies upon various cases raising different issues under the FAAA Act. See, e.g., *Mayer v. City of Atlanta*, 1998 U.S. App. Lexis 27886 (11th Cir. 1998) (holding that Congress evinced an intent to preempt all aspects of consensual towing services by including an explicit exception for nonconsensual towing services); *Deerskin Trading Post, Inc. v. UPS*, No. CV-1346 (FMH) (N.D. Ga. Jan. 29, 1997) (dismissing common law fraud, statutory fraud, negligence, gross negligence, unjust enrichment and imposition of constructive trust claims as preempted, and limiting breach of contract claim to compensatory damages); and *Carsten v. UPS*, No. Civ. S-95-862 U.S. Dist. Lexis 5798 (E.D. Ca. March 20, 1996). However, none of these cases even indirectly speaks to the question of whether state calibration of UPS scales is preempted by the FAAA Act. In *DCRA v. United Parcel Service*, 95-OAD-1359D, et al. (DCRA September 19, 1995), the District of Columbia Department of Consumer and Regulatory Affairs decided that enforcement of its weights and measure laws was preempted by the FAAA Act. The Examiner there found that the enforcement activity "related to" rates, routes, and services; however, he did not, as we do here, address whether that relationship was a direct one, or one that was remote, indirect or tenuous (or if the latter whether it was nonetheless one that had an acute economic effect).

Subsequent decisions of the Supreme Court, involving more traditional areas of state regulation, seem to support a narrower reading of "relating to" language. In *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661-62 (1995), the Supreme Court read the *Morales* ruling narrowly and held that traditional state regulation having no more than an indirect effect on ERISA plans was not "related to" such plans within the meaning of ERISA's preemption clause. The opinion acknowledges, however, that state laws with "acute, albeit indirect, economic effects" might be preempted. *Id.* at 668. In *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 321-322 (1997), the Supreme Court heard an ERISA preemption challenge premised upon the argument that California's Prevailing Wage Law (CPWL) "related to" and had a "connection with" ERISA plans because the CPWL increased the cost of providing certain benefits under those plans, and thereby affected choices made by ERISA plans. The Court held that CPWL, a law in a traditional area of state regulation, did not have a preemptive effect on ERISA plans because the connection between the ERISA plans and the wage law was too tenuous. *Id.* at 330. As we read *Morales*, *Wolens*, and these cases, the test is not simply whether regulation of weights and measures "relates to" UPS's rates, routes or services, but whether any such relationship that may exist is, on the one hand, "indirect," "remote," "tenuous," or "peripheral," or on the other, "direct" or one having an acute economic effect.

Here, the regulatory activity consists of verifying the accuracy of scales, an operation that typically takes about 15-20 minutes once or twice a year. At that level, there is perhaps a potential for some disruption of ordinary business activity; however, in most cases it seems that such disruption, when it occurs at all, is minor and manageable. Administrative fees are sometimes assessed, but the burden seems relatively small, approximately $15 for each inspection according to UPS figures. UPS claims that violations are rare, so fines presumably are not a problem. The weighing function is but one component of the overall service, which extends to pickup, delivery, billing, bar coding, addressing, and so forth. Competitiveness would not seem to be affected: carriers offering competitive services would be identically treated, and it is inconceivable that a shipper would discontinue an otherwise favorable relationship with UPS because a state inspector caused a 15-20 minute inconvenience once or twice a year. Nor would entry or innovation be affected – the relatively minor incremental costs of compliance would not seem likely to deter new competitors, or to inhibit further technological improvements. Further, state regulation of scale calibration in no way affects the rates UPS determines it should charge for a package of a particular weight – it may charge whatever it wants for a package of any particular weight.

Moreover, in reviewing the four Supreme Court cases discussed above, we believe the facts align closer to those of *Blue Cross* and *Dillingham* than *Morales* and *Wolens*. Unlike airline advertising and frequent flyer plans, states have long regulated weights and measures just as they have long regulated prevailing wages. The opposing claims appear to be essentially ones of inconvenience and incrementally increased costs, not ones showing significant impacts upon prices or services. More importantly, the enforcement scheme for uniform weights

and measures, which includes a federal element, does not create distinct and possibly inconsistent standards. States are not duplicating a federal scheme of regulation by calibrating scales; rather, states are the vehicle for carrying out national uniformity, a uniformity desired and promoted by federal authorities.

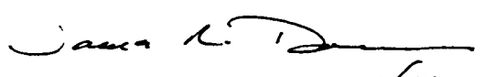
We conclude that, under the facts as understood and related above, the effect of state enforcement of uniform national standards of weights and measures upon UPS services is not direct, nor are its economic impacts acute. Rather, we believe such effect is too tenuous, remote and indirect to be preempted by the FAAA Act. For this reason, we need not reach the question of whether the regulation would otherwise come within an exception in Section 14501.

This is not to imply that all manner of state regulation of this equipment would necessarily be viewed the same. The burden associated with state regulation could become onerous, and interfere with the pro-competitive intent of deregulation, if state enforcement techniques significantly or uniquely damaged UPS' competitive position, or more significantly increased costs. State regulation of other aspects of the equipment package, such as the software developed by UPS to be used by its shippers, could have a more direct connection with and effect upon a UPS service, such as self-billing, and would have to be subjected to further analysis.

Finally, we note in passing that our interpretation that state weights and measures laws, enacted pursuant to a federal scheme, are not preempted by 49 U.S.C. § 14501 is consistent with a 1995 Interstate Commerce Commission (ICC) ruling construing its jurisdiction under the ICC Act. There, a motor carrier asked the ICC to declare that its weight weighing practice was reasonable and that more stringent state requirements for scale accuracy were preempted. The carrier (Yellow Freight System) was using mobile forklift scales that were not certified as "legal for trade" to make requisite weight determinations as part of the carrier's duty to assess and collect the correct tariff rates for transportation. The ICC issued a declaratory order refusing to disrupt the existing state scheme for setting and ensuring standards for accuracy of scales, finding that the state scheme did not interfere with the ICC's jurisdiction and that there was no other basis for preempting the state laws. ICC No. 40853, Yellow Freight System, Inc. of Indiana, *Petition for Declaratory Order-Weighing Shipments*, decided January 9, 1995.

Should we be able to assist you further, please feel free to contact me or James R. Dann of my staff, at (202) 366-9154.

Sincerely,



Roberta D. Gabel
Assistant General Counsel for Environmental,
Civil Rights, and General Law